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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Div. 6 **MOTION TO STRIKE CERTAIN TESTIMONY AND EXHIBITS OF DAN WINSLOW AND ADMONISH THE JURY TO DISREGARD PORTIONS OF HIS TESTIMONY**

Steven DeMocker, by and through counsel, hereby respectfully moves this Court to strike portions of the testimony of Sergeant Dan Winslow, strike certain exhibits offered during his testimony and admonish the jury to disregard portions of his testimony. This motion is based on the Due Process Clause, the Fifth, Sixth, Eighth and Fourteenth Amendments and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The admission of testimony and photographs of Sgt. Winslow's attempted experiment of rolling known bike tires near bike tire impressions found at the crime scene was in error for the following reasons: 1) the testimony and exhibits impermissibly invite the jury to perform its own comparison based on unreliable and irrelevant evidence; 2) the testimony and exhibits impermissibly encourage the jury to consider evidence specifically excluded by the Court, comparison evidence by lay persons (i.e. the jurors themselves); and 3) the testimony and exhibits impermissibly violate the Sixth Amendment and Due Process by permitting jurors to consider their own comparison. The risk that jurors will perform their own comparison based on this unreliable evidence and consider this comparison in their deliberations violates Mr. DeMocker's right to a fair trial, due process, the confrontation clause and his right to counsel.

I. BACKGROUND

This Motion, as we indicated to the Court and counsel in Chambers on Friday, July 30, 2010, is the inevitable result of the testimony permitted by the Court with respect to bicycle tire impression evidence. The juror questions for this witness received on Friday provide confirmation that the jurors are naturally driven to perform their own comparison of the known and questioned tire impressions. Mr. DeMocker's defense team does not submit this as a motion to reconsider. Rather, it is a motion based on events that have now unfolded in Court over the recent weeks of the State's case. Beginning with Sgt. Huante bringing the Gary Fischer bicycle into the courtroom and observing the distinctive "knobby" configuration of the front tire and the "ribbed" appearance of the back tire, the State began to urge the jurors to start to look for tracks that could have been made by those tires. Cmndr. Masher gave the jurors a push in that direction when he was allowed to show pictures of what he identified as the "front" and

"rear" tire of the track he observed near the Glenshandra gate. The "lay evidence" became complete when Sgt Winslow was allowed to display his rolled tire photographs after laboriously displaying his examination and photography of the unknown or questioned tire impressions leading from and back to the Glenshandra Gate. This combination of evidentiary offerings has created the very condition that our prior motions and this Court's orders was designed to prevent.

In the defense Motion in Limine to Preclude Officers as Experts filed on December 18, 2009, the defense noted that Sgt. Dan Winslow apparently conducted his own non-expert bike tire comparisons on July 3, 2008 at the scene which he failed to properly preserve for DPS analysis. In his report he opines, "these tracks appeared to be identical to the initial tracks left in the sand" of the front bike tire tracks and then after applying some other pressure to the rear tire, "it again appeared identical." (Bates 000026). This testimony was presented to the grand jury by Officer Brown even though the DPS report of these identical bike tire impressions said only that the tracks were similar but that "due to the limited clarity and proper scale in the images a more conclusive association was not made." (Bates 000311). DPS also indicated they could not verify if the rear tracks were made by a deflated tire. (Bates No. 001943). The motion argued that Sgt. Winslow should be prohibited from offering opinions about the bike tire comparisons for which he is not qualified.

The State responded that Sgt. Winslow would not be testifying as an expert. (State's Response filed January 4, 2010). At a hearing on the motion, the Court ordered the State to advise Sgt. Winslow against the use of language like "match." (See January 14, 2010 Transcript: 90:25-91:1.) Also at this hearing, the Court ruled that a *Willits* instruction "would appear appropriate" regarding the shoe print and possibly the bike tire impression evidence based on the State's failure to properly preserve the evidence.

At an April 13, 2010, hearing the Court ruled that Winslow may not testify as to any characteristics of the tracks he tracked if his memory of those characteristics was not his independent recollection without the aid of photographs. Lastly, the Court suggested that there were foundation issues with Winslow's measurements of the tracks.

At a hearing on a Motion to Preclude Sgt. Winslow's testimony on the basis of Rule 702, the Court expanded the limitation from use of terms such as "match" and "identity" and further precluded Winslow, as a non-expert in impression comparison evidence, from testifying about bike track "similarities" or "differences" on April 28, 2010.

> As far as Winslow taking the defendant's bike tire out and being able to roll it and say, I am unable to see differences, that is the same as saying, I am able to see similarities. He is not an expert on that, and I won't allow that.

(April 28, 2010 Transcript 169:3-7.)

On May 27, 2010, after an evidentiary hearing the Court ruled, over defense objections, that impression comparison evidence is scientific evidence that meets the standards set in *Daubert* and what was then SB 1189.[1] (May 27, 2010 ME).

On July 28, this Court ordered that non-expert witnesses may not testify as to any comparisons and specifically that Sgt. Winslow could not give any testimony comparing impressions evidence of known impressions with impression evidence from the scene. (July 28, 2010 ME).

II. Sgt. Winslow's testimony and exhibits impermissibly invite the jury to perform its own comparison based on irrelevant and unreliable evidence.

On July 29 and 30 Sgt. Winslow testified. During his testimony the State offered a number of photographs of tire impressions. Although Sgt. Winslow did

[1] Senate Bill 1189 was finally approved by the Legislature in May and was signed into law by Governor Brewer late in the month of May. As was the case with most laws enacted by the Arizona Legislature during its 2010 Term, this law had an effective date of July 29, 2010. On that date, SB1186 became law and is now A.R.S. § 12-2203.

not offer any "comparison" testimony, he did describe his experiment for the jury. His experiment consisted of rolling the bike tires of Mr. DeMocker next to bike tire impressions left at the scene and photographing the impressions both with a "measure box" and without. The State introduced photographs of these impressions, often over defense objections.

On August 3, State's DPS tire impression expert John Hoang is expected to testify about his examination of these photos for the purposes of doing a forensic impression comparison. Hoang received 255 images from the State for purposes of his forensic examination. (Bates 311). Of these images, he determined that only 4 were suitable for comparison purposes and given the poor quality of those four, determined that a conclusive determination could not be made with respect to the bike tire impressions. Hoang's limited opinion based on the four photographs is that the bike's tire tread have similar "class characteristics" as the impressions based on the images, but a more conclusive comparison cannot be made.

Permitting the jury to consider the testimony about Sgt. Winslow's experiment and photographs encourages the jury to perform a comparison based on evidence the State's own expert deems unreliable. The jury has now been told that Sgt. Winslow rolled Mr. DeMocker's bike tires next to the bike tires at the scene. The jury has also been told that there are photographs in evidence of this experiment.

Evidence must be relevant and reliable to be admissible at trial. Arizona Rule of Evidence 401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Photographs from an experiment that are deemed worthless for comparison

purposes by the State's experts are not relevant. Under Arizona Rule of Evidence 402, evidence which is not relevant is not admissible. Finally, under Rule 403 even if evidence is relevant, it may be precluded when its probative value is substantially outweighed by the danger of confusion of the jury. Here, if there is any probative value of photographs deemed unusable for comparison purposes, the danger of confusion to the jury is extreme. The jury is invited to use these unreliable photographs to make their own comparisons of impression evidence. For these reasons, Sgt. Winslow's testimony and exhibits should be stricken and the jury instructed to disregard his testimony.

III. Sgt. Winslow's testimony and exhibits impermissibly encourage the jury to consider evidence specifically excluded by the Court, comparison evidence by lay persons (i.e. the jurors themselves).

Lay opinion about tire impression comparisons has correctly been precluded by this Court. It defies common sense for jurors to then be encouraged to do that which the Court has prohibited the State's lay witnesses from doing.

A.R.S. § 12-2203 applies *Daubert* to scientific evidence in civil and criminal cases in State court and it requires the Court to find all of the following before admitting expert testimony:

1. the witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.

2. the opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.

3. the opinion is based on sufficient facts and data.

4. the opinion is the product of reliable principles and methods.

5. the witness reliably applies the principles and methods to the facts of the case.

The law also requires the court to consider the following factors, if applicable, in determining whether the expert testimony is admissible:

1. whether the expert opinion and its basis have been or can be tested.

2. whether the expert opinion and its basis have been subjected to peer reviewed publications.

3. the known or potential rate of error of the expert opinion and its basis.

4. the degree to which the expert opinion and its basis are generally accepted in the scientific community.

The law closely follows the dictates of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585, 113 S.Ct. 2786 (1993) which requires the Court to serve as a gatekeeper for forensic evidence. As the Supreme Court has explained "[i]ts overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95, 113 S.Ct. 2786.

After a May 27, 2010, evidentiary hearing the Court, over defense objection, found that comparisons of impression evidence met the requirements of *Daubert* and what was then SB 1189. (May 27, 2010 ME). The Court also precluded lay witnesses from testifying to comparisons of impression evidence. (July 28, 2010 ME).

Permitting the jury to consider unreliable photographs of Sgt. Winsow's experiment impermissibly encourages jurors to perform their own comparisons of scientific evidence. The Court correctly precluded lay witnesses from testifying about this kind of comparison because it involves a matter of scientific expertise.

Juries must decide cases based only on evidence properly presented in Court. See Ariz. R. Crim. P. 24.1 (c)(3)(i). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against

a defendant shall come from the witness in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *State v. Ferreria*, 152 Ariz. 289, 731 P.2d 1233 (Ariz. App. 1986) citing *Gibson v. Clanon,* 633 F.2d 851, 854 (9th Cir.1980), cert. denied, 450 U.S. 1035, 101 S.Ct. 1749 (1981), (quoting *Turner v. Louisiana,* 379 U.S. 466, 472-73, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965)).

The *Ferreira* court went on to describe that there is the difference between tests creating new evidence and a jury's review and scrutiny of exhibits. Where a jury's examination of evidence "differ[s] in character" from the evidence offered in court, retrial is mandated.

> Creation of extraneous evidence by the jury through unauthorized tests violates that mandate and requires retrial. However, not every perusal by jurors of tangible exhibits creates new evidence. If the jurors are to accomplish their function of evaluating evidence properly admitted they ought not be prohibited from scrutinizing exhibits, even if their inquiry is more critical than that conducted in open court.
>
> *Id.* at 294, citing *Pennon v. State,* 578 P.2d 1211 (Okla.Crim.App.1978).
>
> So long as the inquiry does not differ in character from that made when the evidence was offered, the jury's examination does not subject defendant to any risks of inculpation against which he has not already had opportunity to protect himself.
>
> *Id.* citing *Thompson v. State,* 518 P.2d 1119 (Okla.Cr.App.1974).
>
> Examination is of a different character when it introduces "extra-record facts" and inferences not reasonably inferable from properly admitted testimony and evidence

Analogously, in attempting to distinguish between proper and improper use of tangible exhibits, the most commonly drawn distinction is between experiments which constitute merely a closer scrutiny of the exhibit and experiments which go 'beyond the lines of evidence' introduced in court and thus

constitute the introduction of new evidence in the jury room. *McCormick on Evidence* § 217 at 541 (E. Cleary, ed., 2d ed. 1972).

In this case, the Court should find that the jury's potential use of unreliable photographs to perform non-expert comparison of scientific evidence is "beyond the lines of evidence" and an "extra record inference not reasonably inferable from properly admitted testimony and evidence." The Court has deemed impermissible lay opinion regarding comparison evidence. To permit the jury to do what lay witnesses are precluded from doing would impermissibly encourage the jury to essentially perform an experiment the Court has already determined may not be performed by a lay witness. This would permit the introduction of new evidence, excluded by the Court. *See also State v. Gomez*, 211 Ariz. 111 (2005 Ariz. App.) (finding no abuse of discretion in the trial court's denial of a magnifying glass to jury to examine fingerprint cards where the trial court was concerned that it would "turn them into expert witnesses".) The *Gomez* court noted that the trial court was entitled to consider the potential for jury confusion arising from the jury's use of a magnifying glass given its lack of training in distinguishing legitimate dissimilarities from mere insignificant distortions in the fingerprint impressions.[2] For these reasons, the above-described testimony and exhibits from Sgt. Winslow should be stricken and the jury instructed to disregard it.

IV. Sgt. Winslow's testimony and exhibits impermissibly violate the Sixth Amendment and Due Process by permitting jurors to consider their own comparison evidence the defense is not able to confront.

The Sixth Amendment to the United States Constitution, made applicable to the

[2] The *Gomez* court held that jurors could properly examine fingerprint cards without the magnifying glass. The distinguishing feature here is that the tire impression photographs that would be examined by jurors have been found by the State's own expert to be unreliable and irrelevant to such a comparison and no expert will be testifying about the photographs.

States via the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Likewise the due process clause of the Constitution requires a fair trial under fundamentally fair procedures. In *Crawford,* after reviewing the Clause's historical underpinnings, the Supreme Court held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S. at 51, 124 S.Ct. 1354. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.,* at 54, 124 S.Ct. 1354. As the Court in *Crawford* explained, "[t]o be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S., at 61-62, 124 S.Ct. 1354.

Permitting a jury to perform its own comparison based on unreliable photographs is to permit them to create testimonial evidence (an out-of-court scientific comparison) that Mr. DeMocker is not able to confront in violation of his rights to due process and confrontation. Such potential violates the confrontation clause and the right to a fair and impartial jury and should not be permitted by this Court. *See e.g. Bulger v. McClay,* 575 F.2d 407, 412 (2d Cir.1978) (affirming grant of habeas where information about defendant's address, which was not made part of the trial record, was discovered from a newspaper article and discussed during jury deliberations as fact that rendered defense implausible); *U.S. v. Simmons,* 923 F.2d 934, 943 (2d Cir.1991) (noting that the Sixth Amendment protects against "extra-record infiltration of jury deliberations"); *Durr v. Cook,* 589 F.2d 891, 892 (5th Cir.1979) (holding that jury foreman's out-of-court experiment to test defendant's self-defense theory merited an evidentiary hearing

to determine whether experiment substantially influenced jury's verdict, thereby violating defendant's constitutional rights); *Marino v. Vasquez,* 812 F.2d 499, 505 (9th Cir.1987) (holding that out-of-court experiment conducted by individual juror, involving second individual who was not a member of the jury and using handgun belonging to that individual, may implicate a defendant's constitutional rights if the experiment substantially influences jury's verdict).[3]

Sgt. Winslow's testimony and exhibits should therefore be stricken and the jury instructed to disregard them.

CONCLUSION

This Court, the prosecution, the defense, and—judging from the press accounts of this week's trial testimony—everyone else in the courtroom knew and understood that all this laboriously offered photographic evidence was being offered precisely to encourage the jurors to do their own comparison. If it was not clear before these witnesses began to testify, it is certainly clear now that the true purpose of this evidence is to invite jurors to become their own experts. The jurors as yet know nothing of the *Willits* instruction that lies ahead; they know nothing of the testimony to be offered this week by DPS criminalist Hoang, but they certainly know that they have been given the tools to do their own comparison—and that is precisely what they are now beginning to do. We write this Motion in an effort to stop that error from further infecting this trial. The Court should strike portions of the testimony of Sgt. Dan Winslow, strike certain exhibits offered during his testimony and admonish the jury to disregard portions of his testimony because: 1) the testimony and exhibits impermissibly invite the jury to perform its own comparison based on unreliable, irrelevant evidence; 2) the testimony

[3] While not every juror experiment results in Constitutional error, none of the cases finding no error involve the circumstances of this case, i.e. either juror consideration of precluded evidence (lay person comparison of bike tire impressions) or juror experiments that rely on data that a State expert has deemed insufficient for purposes of the experiment.

and exhibits impermissibly encourage the jury to consider evidence specifically excluded by the Court, comparison evidence by lay witnesses (i.e. the jurors themselves); and 3) the testimony and exhibits impermissibly violate the Sixth Amendment and Due Process by permitting jurors to consider their own comparison, evidence the defense is not able to confront. The risk that jurors will perform their own comparison based on this unreliable evidence and consider this comparison in their deliberations violates Mr. DeMocker's right to a fair trial, due process, and the confrontation clause.

DATED this 20 day of August, 2010.

By: _____

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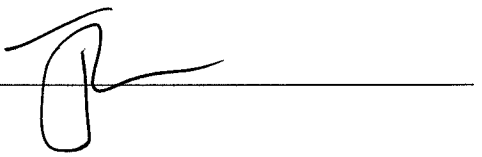

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